

1988

Dennis E. McGoldrick, Chapter 7 Bankruptcy
Trustee for the Estate of John A. Cavanaugh, and
Violet P. Cavanaugh v. Gordon D. Walker and
Covevrest Properties, a Utah Limited Partnership :
Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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DENNIS E. MCGOLDRICK,)	
Chapter 7 Bankruptcy Trustee)	
for the Estate of)	
JOHN A. CAVANAUGH, and)	
VIOLET P. CAVANAUGH,)	
)	Case No. 880152
Substituted Plaintiff)	
and Respondent)	
)	
vs.)	
)	
GORDON D. WALKER and)	Category 16 for
COVECREST PROPERTIES, A UTAH)	Rule 29 argument
LIMITED PARTNERSHIP,)	
)	
Defendants, Counterclaimants)	
and Appellants)	

* * * * *

BRIEF OF APPELLANTS

* * * * *

An Appeal from a Final Order of
the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable John A. Rokich

* * * * *

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Appellants.

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JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court to hear this appeal is embodied in Article VIII, section 9 of the Constitution of the State of Utah and codified in U.C.A. 78-2-2 (3)(j).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

The issue presented to this Court is whether real property and proceeds thereof, transferred by John A. Cavanaugh and Violet P. Cavanaugh, at the commencing of this litigation, into the Violet P. Cavanaugh Trust, is now subject to the judgment lien of the appellant, Gordon D Walker.

The specific real property is a 16 unit apartment complex located at 130 East Avenue 42, in Los Angeles, California. This property was sold by the Cavanaugh's Chapter 7 Bankruptcy Trustee, Mr. Dennis McGoldrick, the substituted plaintiff herein. The cash proceeds of the sale are being held by Mr. McGoldrick pending the outcome of this appeal. If the Walker judgment lien did attach to the real property transferred to the Violet P. Cavanaugh Trust, then Walker is a secured creditor with a priority to the proceeds of the sale of the apartment complex. If Walker's judgment lien did not so attach, because the real property was lawfully placed in the Cavanaugh Trust,

then Walker is an unsecured creditor with no priority to the cash proceeds.

The standard of review is whether an error of law was committed when the District Court failed to invalidate the Violet P. Cavanaugh Trust and allow Appellant Walker, a legitimate judgment creditor, to execute on the real property transferred to the Trust.

APPLICABLE STATUTORY PROVISIONS

At the time of the District Court's Decision in this matter, Utah Code Annotated 25-1-1, et. seq. (1953) as amended, "Fraudulent Conveyances" was applicable. Appellants rely on the following four sections of this Fraudulent Conveyance Statute in this appeal:

Section 25-1-4: "Conveyances by insolvent. Every conveyance made, and every obligation incurred, by a person which is, or will be thereby rendered, insolvent is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration."

Section 25-1-6: "Conveyances by persons about to incur debts. Every conveyance made and every obligation incurred, without fair consideration, when the person making the conveyance or entering into the obligation intends to, or believes that he will, incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

Section 25-1-7: "Conveyance to hinder, delay, defraud creditors. Every conveyance made, and every obligation incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors."

Section 25-1-11: "Trust for Grantor void. All deeds, gifts, conveyances, transfers or assignments verbal or written, of goods, chattel, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person."

These four sections of the code were repealed by the Legislative session of 1988 and replaced by Utah's adoption of the "Uniform Fraudulent Transfer Act." The Uniform Fraudulent Transfer Act did not apply retroactively but became effective on April 25, 1988, six weeks after the Final Order which is the subject of this appeal. Appellant relies on The Uniform Fraudulent Transfer Act in this brief for argumentative purposes only. Section 25-6-5 is attached as Addendum D hereto.

STATEMENT OF THE CASE

This case was tried before a jury during the week of May 19, 1987. The jury found for the defendant, Gordon D. Walker, who had counterclaims against the plaintiffs, John and Violet Cavanaugh. A judgment was entered in Walkers favor in the sum of \$836,446.97.

At the commencing of the litigation in the District Court, the plaintiffs, John and Violet Cavanaugh, transferred all their assets into the Violet P. Cavanaugh Trust. After the jury verdict, and when it became known that the assets of the Cavanaugh's had been transferred into a Trust, Walker sought to void the Trust so that he could collect on his judgment.

The Honorable John A. Rokich invalidated the Violet P. Cavanaugh Trust so far as the personal property contained in the Trust was concerned. However, on the basis of Geary v. Cain, 9 P.2nd 396 (Utah 1932), Judge Rokich held that the Violet P. Cavanaugh Trust was valid as to the real property and that Walker could not execute on the apartment complex transferred into the Trust. It is this portion of Judge Rokich's decision that appellants seek to have reversed.

STATEMENT OF THE FACTS

This action commenced on February 26, 1985, when the plaintiff Cavanaugh's filed a complaint against the defendant Gordon D. Walker in the Third Judicial District Court. On the 10th day of April, 1986, Gordon D. Walker filed a complaint against Cavanaugh's seeking foreclosure and collection on a promissory note. The action of the Cavanaugh's filed in February 1985 and the action of Gordon D. Walker filed in April 1986 were

consolidated into one action by a Court Order on the 22nd day of April 1986. Walker was thereafter designated as the counter-claimant.

During the week of May 19, 1987, a trial by Jury between the parties took place and a judgment in the sum of \$836,446.97 along with a Decree of foreclosure was thereupon entered in favor of Gordon D. Walker and against both John and Violet Cavanaugh. (R-339). After obtaining judgment, Walker learned that the Cavanaugh's real property assets had been transferred by Mr. and Mrs. Cavanaugh into the Violet P. Cavanaugh Trust on April 10, 1986, the same day that Walker commenced his legal action against the Cavanaughs. (R-452, par-2). In fact, all the real and personal property assets of Cavanaughs were transferred into the Violet P. Cavanaugh Trust. (R-408).

Immediately upon obtaining judgment against Cavanaughs, Walker recorded a lien on the apartment complex owned by Cavanaughs in Los Angeles. (Addendum C, page 6). On June 12, 1987, Cavanaughs sought to protect their equity in the apartment complex by placing eight separate Trust Deeds on the property with insiders named as beneficiaries. The total principal sum of these Trust Deeds exceeds \$220,000. (Addendum C, page 7 and 8).

On the 6th day of August 1987, a Deficiency Judgment was entered in favor of Gordon D. Walker and against Cavanaughs in

the sum of \$779,537.74. (R-372). On September 17, 1987, a Motion and Order in Supplemental Proceedings was issued and subsequently heard on November 13, 1987, before Judge Rokich. (R-375 and R-380). The purpose of the supplemental proceeding was to invalidate the Violet P. Cavanaugh Trust and enable Gordon D. Walker to collect his deficiency judgment against the assets of the Cavanaughs now being held in the Violet P. Cavanaugh Trust. (R-376 and 405). Mr. and Mrs. Cavanaugh testified at the supplemental proceeding and were cross-examined concerning the creation of the Trust and its assets. (R-380). Judge Rokich thereafter issued a Memorandum Decision only partially invalidating the Violet P. Cavanaugh Trust. (R-388). Judge Rokich ruled that the personal property transferred into trust could be attached by Walker's judgment, however, he went on to rule that the real property transferred into trust could not so be attached. (R-388 and R-476).

The Memorandum Decision of Judge Rokich, dated February 16, 1988, contains the following nine findings of fact:

"The court found the facts to be as follows;

1. No consideration was given to Mrs. Cavanaugh for the transfer of the Trust assets into the Violet P. Cavanaugh Trust.
2. The Trust property of the Violet P. Cavanaugh Trust has been treated no differently after the transfer into the Trust than it was before.

3. Mrs. Cavanaugh retains full control over the trust property, including the right to modify, amend or revoke the Trust at any time.

4. Mrs. Cavanaugh has the full and complete enjoyment and benefit of the Trust property for the duration of her life.

5. Mrs. Cavanaugh may transfer the Trust property at any time for any purpose.

6. Mrs. Cavanaugh is the beneficiary of all Trust property and proceeds.

7. The alleged sole purpose for the Trust was to provide for tax benefits.

8. At present, Violet P. Cavanaugh is the sole Trustee and will remain so for the duration of her life.

9. A true and correct copy of the Trust is attached hereto, and the Trust itself substantiates the above representation." (R-339). [Copy of Trust omitted, but located at R-407]

The entire Memorandum Decision of Judge Rokich is attached hereto as addendum A. This Memorandum Decision was entered as a final Order on March 16, 1988 and a copy of the Order is attached hereto as addendum B. (Memorandum Decision at R-388 and Order at R-476).

When Walker commenced collection of his judgment by garnishment and attachment of personal property assets, Cavaugh immediately filed bankruptcy in The United States Bankruptcy Court, Central District Of California. (Notice of Bankruptcy filed with Utah Supreme Court on or about July 11, 1988). The Chapter 7 Trustee, Dennis McGoldrick, took possession of all the assets of the Violet P. Cavanaugh Trust,

including the real property. Mr. McGoldrick, as trustee, revoked the Violet P. Cavanaugh Trust and commenced to sell the real property apartment. On or about November 2, 1988, the apartment complex of the Cavanaughs in Los Angeles was sold and the approximate cash sum of \$675,000 was placed with the Bankruptcy Trustee. (Attached hereto as addendum C is a true and correct copy of a notice of sale of this property by the trustee coupled with a title report fully describing the property and liens thereon).

On March 1, 1991 an Order was entered in the Bankruptcy Court lifting the automatic stay provision of the Bankruptcy Code for the sole purpose of allowing this appeal to be concluded so that a determination of Walker's interest in the cash proceeds of the sale of the real property could be determined. On April 15, 1991, Dennis McGoldrick, the Chapter 7 Bankruptcy Trustee for the bankrupt estate of John and Violet Cavanaugh, was substituted as plaintiff and respondent in this action.

SUMMARY OF ARGUMENTS

Appellants contend in POINT I of their argument that because Walker was a creditor of Cavanaughs and because Cavanaughs conveyances to trust were without consideration and

rendered them insolvent, the trust should be declared void to permit Walker to collect on his judgment, regardless of any actual intent to defraud.

Appellants contend in POINT II of their argument that there are sufficient "badges or indicia" of an actual fraudulent conveyance and that for this reason the Cavanaugh Trust should also be declared void as against Walker's judgment. Those badges of fraud are (1) continuing in use and property ownership after the transfer; (2) conveyance at the commencement of this litigation; (3) a transfer to a family member, ie: the same Violet P. Cavanaugh as is the defendant; and (4) no consideration for the transfer.

Appellants contend in POINT III of their argument that the legal basis upon which the lower Court did uphold the Cavanaugh Trust was an error. Appellants argue that the 1975 Utah Supreme Court case of Leach vs. Anderson should be expanded to include real property and that Section 25-1-11 of U.C.A. (1953), with its reference to "Deeds" should include real property. Also on this point, the 1931 Geary v. Cain case, relied on by the lower Court, is easily distinguished because in Geary the transfer of property was an outright conveyance of title, without limitation or restriction, to a third party.

Appellants contend in POINT IV of their argument that the Cavanaughs knew they owed Walker \$422,000 with interest on a promissory note and that the note was due. Cavanaughs conveyed real property to trust without consideration in anticipation of incurring a debt beyond their ability to pay.

Appellants contend in POINT V of their argument that public policy and overwhelming legal authority prohibit a person from placing his property beyond the reach of creditors while at the same time allowing that person to retain an interest and control over the property.

Appellants contend in POINT VI of their argument that there is no rational basis to distinguish real property from personal property for purposes of this case.

ARGUMENT

POINT I. THE VIOLET P. CAVANAUGH TRUST IS VOID AS AGAINST WALKER'S JUDGMENT WITH RESPECT TO REAL PROPERTY AND PROCEEDS THEREOF, AS WELL AS PERSONAL PROPERTY, PURSUANT TO UTAH CODE ANNOTATED 25-1-4 (1953) AS AMENDED, AND THE CASE LAW THEREON.

Section 25-1-4, Utah Code Annotated 1953 states:

"Conveyances by insolvent. Every conveyance made, and every obligation incurred, by a person which is, or will be thereby rendered, insolvent is fraudulent as to creditors, without

regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration."

In the Supreme Court case of Meyer v. General American Corp., 569 P.2nd 1094, (Utah 1977), Mr. Justice Ellett in construing this statute stated the three essential elements that must be proved:

"Both the statute and case law interpreting the statute make it clear that subjective or actual intent to defraud are not elements of a fraudulent conveyance claim. Meyer is obligated to show only (1) that she was a creditor of GAC; (2) that GAC was insolvent at the time the conveyance was made to Terra; and (3) that the conveyance was not given for a fair consideration."

In the present case, all three of these elements are clearly evident. That Walker is a creditor of the Cavanaughs was proven before a jury and is shown by the judgment entered in the Third District Court in the sum of \$779,537.74 in Walkers favor. (R-372). That Cavanaughs were rendered insolvent by the conveyance is clear from the fact that Cavanaughs transferred all their assets into the Violet P. Cavanaugh Trust, supported their lifestyle on the basis of the trust assets, and filed bankruptcy due to insolvency as a result of Walker's large judgment. (R-408 and Addendum A page 2). That the conveyance was not given for a fair consideration is clear from the findings of fact stated by Judge Rokich wherein he says, "No consideration

was given to Mrs. Cavanaugh for the transfer of the Trust assets into the Violet P. Cavanaugh Trust. (Addendum A page 2)

Appellant Gordon D. Walker, contends that the argument set forth in this POINT I is sufficient in and of itself to reverse the ruling of the lower Court and enable Walker to now collect from the bankruptcy Trustee the proceeds of the sale of Cavanaugh's real property.

POINT II. THE FACTS ARE SUFFICIENT TO DEMONSTRATE THAT CAVANAUGHS HAD ACTUAL INTENT TO DEFRAUD THEIR CREDITOR AND THE VIOLET P. CAVANAUGH TRUST SHOULD BE DECLARED VOID AS AGAINST ALL ASSETS PURSUANT TO UTAH CODE ANNOTATED 25-1-7 (1953) AS AMENDED.

Section 25-1-7 Utah Code Annotated (1953) states:

"Conveyance to hinder, delay, defraud creditors. Every conveyance made, and every obligation incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors."

The Supreme Court case of Dahnken, Inc. Of Salt Lake vs. Wilmarth, 726 P.2nd 420 (Utah 1986), dealt with the transfer of real property by a son to his stepfather to avoid imminent creditors. When examining the issue of actual intent in the context of the above quoted statute, this court held the following:

"Although actual fraudulent intent must be shown to hold a conveyance fraudulent pursuant to 25-1-7, its

existence may be inferred from the presence of certain indicia of fraud or "Badges of fraud." [Citing Given v. Lambeth, 10 Utah 2nd 287, 291, 351 P.2nd 959, 962 (1960).] Badges of fraud that pertain to this case are a debtor's (1) continuing in possession and evidencing the perquisites of property ownership after having formally conveyed all his interest in the property, (2) making a conveyance in anticipation of litigation, and (3) making a conveyance to a family member without receiving fair consideration."

Dahnken, at 726 P.2nd at 423.

All of these "Badges of Fraud" exist in the present case as well. With respect to subpart (1) from the above quote, property ownership prerequisites, Judge Rokich's findings of fact (page 2 of addendum A) make it very clear that the Cavanaugh's continued in possession after the conveyance. Paragraphs 2, 3 and 4 of Judge Rokich's Memorandum Decision state as follows:

"2. The Trust property of the Violet P. Cavanaugh Trust has been treated no differently after the transfer into the Trust than it was before.

3. Mrs. Cavanaugh retains full control over the Trust property, including the right to modify, amend or revoke the Trust at any time.

4. Mrs. Cavanaugh has the full and complete enjoyment and benefit of the Trust property for the duration of her life."

Clearly Mr. and Mrs. Cavanaugh continued to enjoy all the benefits of the trust property after it was conveyed.

With respect to subpart (2) of the above Dahnken quote, making a conveyance in anticipation of litigation, consider the uncontested and undeniable fact that on April 10, 1986 Walker

filed his action against Cavanaughs and on the same day, Cavanaughs transferred their California real property into the Trust. (R-452). Walker's claim, and ultimate verdict of \$836,446.97, was easily forecasted by Cavanaughs because they had signed a \$422,000 promissory note with Walker that was long overdue and payment thereon was being demanded.

With regard to subpart (3), conveyance to a family member without receiving fair consideration, again look at Judge Rokich's finding of fact in his memorandum decision, which states, "No consideration was given to Mrs. Cavanaugh for the transfer of the Trust assets into the Violet P. Cavanaugh Trust." There was no consideration for this transfer and defendant debtor Violet P. Cavanaugh is the same Violet P. Cavanaugh in whose name the Trust was created. (Addendum A)

As in Dahnken, we have here the obvious badges of fraud in that there was continued beneficial enjoyment of the property, anticipated litigation and no consideration. On the basis of Dahnken alone, this Court has the precedent to void the Trust as to the lawful and legitimate judgment lien of Mr. Walker.

The Uniform Fraudulent Transfer Act, passed by the legislature in 1988, codifies these badges of fraud in U. C. A. 25-6-5 (2). A copy of U. C. A. 25-6-5 (2) is attached hereto as addendum D. Appellant contends that the legislature, by adopting

this uniform act, has validated the law of Dahnken and reinforced the fairness of not allowing fraudulent conveyances to avoid creditors.

There is another indication of fraudulent intent by the Cavanaughs in this case. On June 12, 1987, just several weeks after trial completion, Cavanaughs recorded eight Trust Deeds on the apartment property with insiders named as beneficiaries. These Trust Deeds total more than \$220,000 in debt and effectively shield the property equity unless the Violet P. Cavanaugh Trust is declared void. (Addendum C page 7 and 8). These junior lien holders and insiders to the Cavanaughs, with Trust Deeds on the property recorded after Walker's judgment, will be given a priority to the cash proceeds of the sale of the apartment unless Judge Rokich's ruling is reversed. Appellant Walker respectfully asks this Court to apply the law of U.C.A. 25-1-7 and Dahnken to stop Cavanaugh's fraudulent conveyance scheme.

POINT III. THE BASIS UPON WHICH THE DISTRICT COURT DID UPHOLD THE CAVANAUGH TRUST AS AGAINST THE WALKER JUDGMENT IS ERRONEOUS AND LEACH vs. ANDERSON SHOULD BE EXPANDED TO INCLUDE REAL PROPERTY.

The District Court held that the personal property transferred into the Violet P. Cavanaugh Trust was subject to execution. However, on the basis of GEARY vs. CAIN, 9 P.2d 396 (Utah 1932), the District Court held that the real property transferred into this Trust could not be executed upon. Judge Rokich in his Memorandum Decision specifically stated; "If it were not for the Geary case the court would be inclined to invalidate the trust as to the real property also." (Addendum A, bottom of page 4)

However, the Geary case is easily distinguished from the present case and can not be considered as controlling law in this case. Mrs. Geary had a judgment against Mr. Cain and sought to execute against real property transferred into a corporation in which Mr. Cain had a share of stock. The name of the corporation was the Doris Trust Company. A simple reading of Geary clearly reveals that the transfers of real property were not into a trust in the name of the debtor, but consisted of an bona fide conveyance to a separate legal entity, ie: The Doris

Trust Company. The Supreme Court in Geary noted that the Doris Trust Company was legitimate, not the alter ego of the debtor, and that the transfers of real property had taken place at least four years before the creditor's claim arose against the debtor. After examining these conveyances, the Supreme Court stated in Geary as follows; "These are all outright conveyances of title, without limitations, reservations, or restrictions of any kind material to the present inquiry." (9 P.2d at 397).

Thus in Geary, and unlike the present case, the transfer of the real property was a legitimate conveyance to a separate corporation and had nothing to do with a revocable trust set up solely for the benefit of the grantor debtors. The Supreme Court in Geary refused to allow Mrs. Geary to execute on the real property because the grantee thereof was neither the alter ego, agent, nor trustee of the grantor debtor. The facts and legal conclusions of the Geary case are dissimilar in all material respects to the present case.

In the present case, in concluding that the Violet P. Cavanaugh Trust was valid as against Walker's judgment, the District Court apparently relied upon the following language of the Geary case; "Section 5816 [former U.C.A. 57-1-11, fraudulent transfer] relates only to transfers of personal property, not real property,....." (9 P.2d at 399). This

statement by the court in Geary is obviously obiter dictum and had no real application to the Geary facts. The thrust of the Geary case was whether the Doris Trust Company was the alter ego of the judgment debtor. The Supreme Court concluded that it was not and protected the validity of the distinct corporate entity.

It is the more recent case of Leach vs. Anderson, 535 P.2d 1241 (Utah 1975), that examines U.C.A. 25-1-11 (1953) as amended, and the validity of conveyances made into a trust when the interests of creditors are concerned. Section 25-1-11 reads as follows:

"Trust for Grantor void. All deeds, gifts, conveyances, transfers or assignments verbal or written, of goods, chattel, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person."

The Supreme Court in Leach ruled that the Trust created by Mrs. Anderson was invalid as against the judgment of Mr. Leach because it had been created for her use and benefit and could not be used to prevent the judgment creditor from recovering the obligation owing. However, in Leach, there were sufficient personal property assets to satisfy the judgment and therefore the Court did not address the issue as to whether the real property was also subject to plaintiff's judgment. The Supreme Court in Leach specifically opens the door against Geary by

recognizing the common law and questioning that section 25-1-11 applies also to real property transfers:

"Defendants also make the argument that the statute under scrutiny covers only personal property and therefore could not affect the part of the trust that consists of real property. The statute is but a codification of the common law, which for reasons discussed herein, refused to give recognition to trusts of this character involving any kind of property. However, the evidence here is that there is very substantial personal property, including stock in the Anderson Enterprises, valued at \$145,000. Accordingly, no useful purpose would be served by our being concerned as to whether the real property may be subjected to plaintiff's judgment." (535 P. 2nd at 1244, emphasis added).

Footnote 5 to the above Leach quote provides ample authority for the position that a trust for the benefit of the grantor is uniformly held entirely invalid as to any kind of property and creditors can reach the trust property. Appellant herein contends that the stated obiter dictum of Geary, relied upon by the lower Court in this case, is a clear aberration to the prevailing rule. The common law majority position should be followed in the present case for the obvious reason of protecting Walker's legitimate judgment against the fraudulent conveyance of Cavanaugh's.

Unlike the Leach case, the Violet P. Cavanaugh Trust does not contain sufficient personal property to satisfy the judgment of Walker. Judge Rokich in his Memorandum Decision stated the following in this regard;

"It is unfortunate that the Supreme Court in the Leach case did not address the issue of real property being subject to execution if conveyed to a trust such as the Violet P. Cavanaugh Trust. Justice Ellett, author of the majority opinion, stated that inasmuch as there was ample personal property assets to satisfy the judgment it would not be necessary to address the real property issue." (Addendum A, at page 4)

The real property issue in the Cavanaugh Trust must now be addressed because it is the only remaining source sufficient to pay the Walker judgment. Section 25-1-11 of U.C.A., with its reference to "deeds," and the case law of Leach, provides now a third legal basis upon which the decision of the lower court can and should be reversed to include real property. Accordingly, appellant respectfully requests that this Supreme Court follow the common law, expand Leach to include real property, and distinguish Geary as argued herein.

For another important reason this Court can expand Leach to include real property pursuant to U.C.A. 25-1-11. With the passing of Utah Code Annotated 25-6 et. seq., The Uniform Fraudulent Transfer Act, former U.C.A. section 25-1-11 was repealed. Section 25-1-11 will be subject to review on a less frequent basis and quickly die altogether. In other words, the Geary case ruling on language identical to 25-1-11 is now moot because the language of 25-1-11 has been repealed. Future cases dealing with this issue will be construed pursuant to the new

statute. The changing of the law in this area has already been done by the legislative session of 1988. The Supreme Court is only being asked to focus on the legitimate claim of a single creditor. This Cavanaugh v. Walker case becomes a one time only precedent.

POINT IV. UTAH CODE ANNOTATED SECTION 25-1-6 (1953) AS AMENDED PROVIDES ANOTHER STATUTORY BASIS TO VOID THE CAVANAUGH TRUST WITH RESPECT TO THE REAL PROPERTY CASH PROCEEDS CONTAINED THEREIN.

Section 25-1-6 U.C.A. 1953 provides the following;

"Conveyances by persons about to incur debts. Every conveyance made and every obligation incurred, without fair consideration, when the person making the conveyance or entering into the obligation intends to, or believes that he will, incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

In this case, Cavanaugh's knew that a promissory note for \$422,000 was due and owing with interest. The debt was incurred and about to be reduced to judgment. There was no consideration, as has been previously discussed, and this obligation by Cavanaugh to Walker was beyond Cavanaugh's ability to pay absent the trust assets. Thus this section of the code provides yet another basis to hold for Walker and invalidate the Cavanaugh Trust.

All four sections of the Utah Code set forth so far in this brief can and should be construed to apply to the facts of this case. On the basis of one or all of these sections, the lower Court should be reversed.

POINT V. PUBLIC POLICY PROHIBITS AN OWNER OF REAL OR PERSONAL PROPERTY FROM PLACING THAT PROPERTY BEYOND THE REACH OF HIS CREDITORS WHILE HE CONTINUES TO BENEFIT AND ENJOY IT.

Appellant contends that the judgment debtors should not be allowed to hide their assets behind a revocable grantor trust, set up for their benefit and use, to the detriment of their legitimate judgment creditors. There are no valid public policy arguments that would allow a party in litigation to transfer his real property into a trust, for his benefit and use, and thereby prevent an execution thereon by a creditor. Public policy demands that such transfers into trust be held void as to lawful creditors. In LEACH, the Utah Supreme Court stated with regard to section 25-1-11 U.C.A. 1953:

"The intent and the effect of the statute is to prevent a person from using a trust as a device by which he can retain for himself and enjoy substantially all of the advantages of ownership and at the same time place it beyond the legitimate claims of his creditors." (535 P.2d at 1243)

Indeed, nothing would be more abhorrent and frustrating to the judicial system than preventing recovery of judgments by simply allowing debtors to transfer their real estate into a trust pending litigation. The law is clear and public policy is firmly opposed to the possibility of the beneficial owner of property placing that property beyond the reach of his creditors while continuing to enjoy it.

The general rule is stated at 37 Am Jur 2d, page 720;

"The recognized indicia or badges of fraud concerning conveyances attacked as fraudulent as to creditors include any reservation of benefit to the transferor or his family. One may not be the beneficial owner of property and still have it exempt from his debts. Indeed, it has been said that no effort of a debtor to hinder or delay his creditors is more severely condemned by law than an attempt to place his property where he can enjoy it and at the same time require his creditors to await his pleasure for the payment of their claims out of it. Subsequent, as well as existing, creditors may have such a transaction declared fraudulent." (Section 27, emphasis added).

"Basically, it is recognized that an individual cannot create out of his own property for his own benefit a trust for himself and thereby defeat his creditors of their lawful demands." (Section 28, emphasis added).

Numerous cases and other legal authorities have phrased this basic law in articulate terms. In Nelson v. California Trust Co., 33 Cal.2d 501, 202 P.2d 1021 (1949), the judgment creditor sought to reach the assets of a trust created by his judgment debtor. The California court held that all of the

trust property was subject to the claim of the creditor, and said;

"It is against public policy to permit a man to tie up his property in such a way that he can enjoy it but prevent his creditors from reaching it, and where the settlor makes himself a beneficiary of a trust any restraints in the instrument on the involuntary alienation of his interest are invalid and ineffective. [citations omitted]. Since Bixby was the sole beneficiary, all the property in the trust is subject to the claims of his creditors." ((202 P.2nd at 1021, emphasis added).

Cited with approval in the Nelson case is McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 P. 995 (1916), where the California court held that a spendthrift trust attempted to be created in the settlor's own favor is invalid, even though he had no fraudulent intent toward his creditors. The cases are uniform in holding that quite apart from statute, a person cannot create a spendthrift trust for himself which shall be effective against the rights of his subsequent creditors. (See 44 Harvard Law Review 205 . Erwin Griswold). Furthermore, as shown in the above quote, there is no distinction between real and personal property for purposes of this case. In the commercial marketplace real property equity is used as a cash medium every bit as much as personal property.

The Violet P. Cavanaugh Trust in this case contains the following spendthrift clause;

ARTICLE X

SPENDTHRIFT PROVISION

"The interests of each beneficiary in income and principal shall be free from the control or interference of any creditor of such beneficiary, or the spouse of a married beneficiary, or the parent of the child beneficiary, and shall not be subject to attachment or be subject to assignment." (R-410).

In light of this spendthrift clause and Judge Rokich's findings of fact that Violet Cavanaugh is the beneficiary and sole trustee of the Trust with full control over it, (R-389), consider these additional authorities cited with approval by the Utah Supreme Court in Leach:

"Even in jurisdictions in which spendthrift trusts are permitted, the settler cannot create a spendthrift trust for his own benefit. It is immaterial that in creating the trust the settler did not intend to defraud his creditors. It is immaterial that he was solvent at the time of creation of the trust." Scott on trusts, Vol.II, Sec.156, p.1092.

"If a settlor creates a trust for his own benefit and inserts a spendthrift clause, it is void as far as then existing or future creditors are concerned, and they can reach his interest under the trust." Bogert, Trusts and Trustees, (2d Ed.), Sec.223, at p.438.

"A man cannot put his own property beyond the reach of creditors and at the same time reserve substantial interests in it or control over it." Griswold, Spendthrift Trusts, page 543.

The following two quotes, dated 1862 and 1898 respectively, well characterize the negative impact of allowing a debtor to conceal his assets from just creditors by use of a trust.

"It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds. Every man about to

engage in business where there was a chance of loss, would place himself under the pupilage of trustees, and everybody's estates would be passing under settlement deeds and trustees' accounts through the courts, before, in the natural course of things, the jurisdiction of the Orphans' Court would attach." Mackason's Appeal, 42 Pa. 330 at 338, (1862)

"It would be a startling and revolutionary doctrine to hold that this reserved interest cannot be reached by the plaintiff as a creditor. If such is the law it would make it possible for a person free from debt to place his property beyond the reach of creditors, and secure to himself a comfortable support during life, without regard to his subsequent business ventures, contracts or losses." Schenck v. Barnes, 50 N.E. 967, N.Y. 316, 321, 41 L.R.A. 395, ¹⁸⁹⁸

The above general statements of the law and public policy are followed in many cases set out in the notes to 119 ALR 35 and 34 ALR 2d 1342. The cases cited uniformly hold that the grantor cannot avoid or hinder his own creditors by such a provision as is in the Cavanaugh Trust. The very creation of the Cavanaugh Trust with its spendthrift provision, made at the commencing of this litigation, evidences a scheme with a clear purpose of placing property beyond the reach of creditors. Appellant Walker was the imminent creditor, his \$422,000 promissory note was long past due. In the Cavanaugh Trust the spendthrift provision is expressly for the protection and insulation of the grantors who thereafter became indebted to Walker. By the terms of the trust, all of the assets can be used and have been used for the benefit of the grantors and the

entire trust should now be declared void as against this creditor of the grantors.

Another on point statement of the controlling rule applicable to this case is set forth in the Restatement of Trusts Second, Section 156, p. 326, as follows;

"156 WHERE THE SETTLOR IS A BENEFICIARY

(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interests.

(2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."

The Comment following this restatement of the law is also relevant;

" a. Intention to defraud creditors not required. The rules stated in this Section are applicable although the transfer is not a fraudulent conveyance. The interest of the settlor-beneficiary can be reached by subsequent creditors as well as by those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors."

The numerous quotes in this POINT V tie back as well to the arguments set forth in POINTS I, II, III and IV. These statements of law are grouped here to emphasize the strong public policy which prohibits transfers to trusts to avoid creditors. In his Memorandum Decision, Judge Rokich made the following conclusions; "There is no question that the Violet P.

Cavanaugh Trust was created for her own use and benefit and to the detriment of her creditors. (R-390). If it were not for the Geary case the court would be inclined to invalidate the trust as to the real property also." (R-391). In other words, the District court recognized the injustice of these transfers into trust, but felt legally bound by Geary to uphold the trust as to the real property. Appellant again respectfully requests that this Court follow the sound reasoning of the uniformly held position by declaring the Violet P. Cavanaugh trust void as to real property as well as personal property.

POINT VI. THERE IS NO RATIONAL BASIS TO DISTINGUISH REAL FROM PERSONAL PROPERTY IN THIS CASE AND THE VIOLET P. CAVANAUGH TRUST SHOULD BE DECLARED VOID AS TO BOTH TYPES OF PROPERTY.

On April 25, 1988, six weeks after Judge Rokich's ruling in this case, Utah adopted the Uniform Fraudulent Transfer Act, now codified in U.C.A. Section 25 Chapter 6. Appellant argues that the enactment of this uniform statute provides a strong reason for The Supreme Court to reverse the lower Court and hold in this case that the real property of Cavanaugh's can not be conveyed to trust free of the judgment of Walker. The Uniform Fraudulent Transfer Act makes no distinction between real and

personal property, or property in trust as opposed to an outright conveyance. This Fraudulent Transfer Act simply defines property as anything that may be the subject of ownership. Appellants urge The Supreme Court to also eliminate this artificial distinction between real and personal property conveyances to avoid creditors.

That the distinction between real and personal property is artificial is evident by the fact that Cavanaugh's Bankruptcy Trustee, Mr. Dennis McGoldrick, sold the Cavanaugh real property on November 2, 1988 and took possession of the cash proceeds. Those proceeds are being held pending the outcome of this appeal. The real property was thus easily and quickly reduced to cash by a sale. There simply is no basis to justify voiding the Cavanaugh Trust as to personal property, but not real property. The United States Bankruptcy law enabled the Trustee to revoke the Cavanaugh Trust entirely, without regard to the different types of property contained therein. Appellant fails to understand any logical basis upon which the bankruptcy trustee can immediately reach all assets of the trust, while the prior judgment creditor, appellant herein, can only reach the personal property assets which are insufficient to satisfy his judgment. None of the authorities cited in POINT V make a distinction between real and personal property. Real property in todays


economy is for all practical purposes every bit as liquid as personal property. To disallow Walker from recovering his judgment on the basis of this mock distinction is totally unjustified.

CONCLUSION

This case presently consists of an obvious injustice upon the appellant. For the sole reason that Mr. and Mrs. Cavanaugh had their equity in real estate, as opposed to personalty, Mr. Walker is unable to satisfy his judgment. That judgment came after a jury trial and the substance of the trial is not being contested. Each and every one of the four Fraudulent Conveyance Statutes provides a basis to invalidate the Violet P. Cavanaugh Trust and allow Mr. Walker to satisfy his judgment from the real property assets contained therein. Strong public policy condemns this kind of conveyance transaction. The real property has been reduced to cash and is being held by the bankruptcy Trustee, pending a decision by this court. In substance therefore, there is no difference between real and personal property.

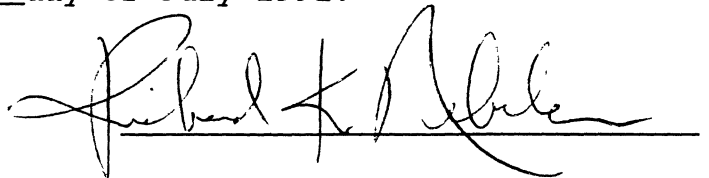
Appellant respectfully seeks an Order from this Court reversing the Final Order of the lower Court, (Addendum C) and declaring the Violet P. Cavanaugh Trust void as to both the personal property and the real property cash proceeds. The judgment lien of Walker would then have attached to the real property of Cavanaugh upon entry of judgment and justly enable him to now satisfy his judgment.

Dated this 26th day of June 1991

By 
Richard K. Nebeker
Attorney for Appellant
Gordon D. Walker

CERTIFICATE OF HAND DELIVERY

I hereby certify that ⁴a true and correct copy^s of the appellant's brief was hand delivered to the office of Respondent's counsel, Douglas J. Payne, at 215 South State Street, suite 1200, this 1st day of July 1991.



ADDENDUM A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN A. CAVANAUGH and	:	
VIOLET CAVANAUGH,	:	
	:	
Plaintiffs,	:	MEMORANDUM DECISION
	:	
VS.	:	CIVIL NO. C 85-1499
	:	
GORDON D. WALKER and COVECREST	:	
PROPERTIES, a Utah Limited	:	
Partnership,	:	
Defendants and	:	
Counter-Claimants for	:	
Foreclosure.	:	

Defendants' Motion and Order in Supplemental Proceedings came on for hearing on the 13th day of November. Plaintiffs were represented by Colin R. Winchester. Defendants were represented by Richard R. Nebeker. The court heard testimony, received a copy of the Violet P. Cavanaugh Trust and granted counsel an opportunity to submit memoranda. The court took the matter under advisement pending the receipt of the memoranda. The court orally advised counsel of its decision and stated that a written memorandum decision would be mailed to counsel.

The issue presented to the court is whether the property transferred by John Arthur Cavanaugh and Violet P. Cavanaugh into the Violet P. Cavanaugh Trust pending this litigation is now subject to lawful execution by the judgment creditor.

In order to arrive at a decision in this case it was essential to ascertain what the facts are in order to determine the validity of the Violet P. Cavanaugh Trust.

The court found the facts to be as follows:

1. No consideration was given to Mrs. Cavanaugh for the transfer of the Trust assets into the Violet P. Cavanaugh Trust.

2. The Trust property of the Violet P. Cavanaugh Trust has been treated no differently after the transfer into the Trust than it was before.

3. Mrs. Cavanaugh retains full control over the trust property, including the right to modify, amend or revoke the Trust at any time.

4. Mrs. Cavanaugh has the full and complete enjoyment and benefit of the Trust property for the duration of her life.

5. Mrs. Cavanaugh may transfer the Trust property at any time for any purpose.

6. Mrs. Cavanaugh is the beneficiary of all Trust property and proceeds.

7. The alleged sole purpose for the Trust was to provide for tax benefits.

8. At present, Violet P. Cavanaugh is the sole Trustee and will remain so for the duration of her life.

9. A true and correct copy of the Trust is attached hereto, and the Trust itself substantiates the above representation.

ARGUMENT

Section 25-1-11 U.C.A. (1953) as amended is directly in point and provides as follows:

25-1-11 Trust for Grantor void. All deeds, gifts, conveyances, transfers or assignments verbal or written, of goods, chattel, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person.

The Utah Supreme Court in the case of Leach v. Anderson, 525 P2d 1241 (1975) interpreted Section 25-1-11 and the applicability to a case with similar facts in this case.

The Supreme Court in the Leach v. Anderson case ruled that the trust created in the Leach case was invalidated.

In comparing the facts in this case to the facts in the Leach case the court concludes that the law set forth in the Leach case is applicable.

There is no question that the Violet P. Cavanaugh Trust was created for her own use and benefit and to the detriment of her creditors.

The court concludes that the Violet P. Cavanaugh Trust is declared invalid as to the personal property conveyed to the trust. The invalidation of the trust as to the personal property is not to be interpreted to mean that the defendants are precluded from executing on other assets of the plaintiffs.

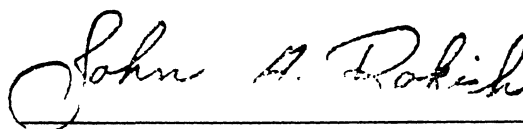
It is unfortunate that the Supreme Court in the Leach case did not address the issue of real property being subject to execution if conveyed to a trust such as the Violet P. Cavanaugh Trust. Justice Ellett, author of the majority opinion, stated that inasmuch as there was ample personal property assets to satisfy the judgment it would not be necessary to address the real property issue.

Since the Leach case did not address the issue of whether real property would be subject to defendants' judgment; the court referred to Geary v. Cain 9 P2d 396 1932 cited by plaintiffs. The Geary case interpreted Section 5816 which is identical to Section 25-1-11 and stated as follows: Section 5816 relates only to transfers of personal property, not real property, and hence has no application to the conveyance of the real estate here involved. It relates only to "goods, chattels or things in action", which in any sense of the terms are not real property.

The statute has remained unchanged and the Geary decision has not been overruled.

If it were not for the Geary case the court would be inclined to invalidate the trust as to the real property also.

Dated February 16, 1988..

A handwritten signature in cursive script, reading "John A. Rokich", written in dark ink. The signature is positioned above a horizontal line.

JUDGE JOHN A, ROKICH

Copies mailed to counsel.

ADDENDUM B

CALLISTER, DUNCAN & NEBEKER
Richard K. Nebeker (A2370)
Suite 800 - Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

Attorney for Gordon D. Walker

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH
MAR 16 4 45 PM '88
H. D. JONES, CLERK
BY W. J. WALKER
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

JOHN A. CAVANAUGH and)	
VIOLET P. CAVANAUGH,)	
	)	ORDER PARTIALLY INVALIDATING
Plaintiffs,	)	THE VIOLET P. CAVANAUGH TRUST
)	
vs.)	
)	
GORDON D. WALKER and COVECREST	)	Civil No. C85-1499
PROPERTIES, a Utah Limited)	
Partnership,)	
)	
Defendants and)	
Counter-Claimants for)	
Foreclosure.)	

* * * * *

Defendant and counter-claimant, Gordon D. Walker's Motion and Order in Supplemental Proceedings came on for Hearing on the 13th day of November, 1987. Plaintiffs were represented by Colin R. Winchester. Defendants were represented by Richard K. Nebeker. The Court heard testimony, received a copy of the Violet P. Cavanaugh Trust and granted counsel an opportunity to submit memoranda. The Court took the matter under advisement pending the receipt of the memoranda.

The issue presented to the Court was whether the property transferred by John Arthur Cavanaugh and Violet P. Cavanaugh into the Violet P. Cavanaugh Trust pending this litigation is now subject to lawful execution by the judgment creditor.

Legal memoranda was submitted by the parties, and based upon the testimony given, the records and files of the Court, and said legal memoranda, the Court issued its Memorandum Decision, (a copy of which is attached hereto). Now therefore, and in accordance with said Memorandum Decision, it is hereby;

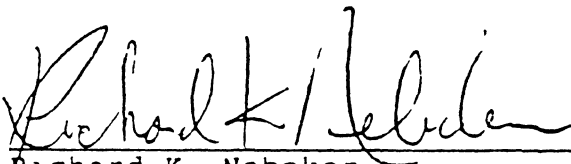
ORDERED, ADJUDGED AND DECREED THAT;

The Violet P. Cavanaugh Trust is invalid as to all of the personal property, conveyed to the Violet P. Cavanaugh Trust including but not limited to all accounts receivable, notes payable, rents collectible, securities, goods, chattels, accounts, personalty and things in action held within said Trust. Accordingly, any and all such personal property may now be legally and lawfully executed upon by defendants/counter-claimants Gordon D. Walker and Covecrest Properties.

On the basis of Geary v Cain 9 P2d 396 (1932) the Violet P. Cavanaugh Trust is hereby declared valid with respect to the real property held in the Violet P. Cavanaugh Trust and defendants/counter-claimants are precluded from foreclosing said real property.

Neither this Order nor the Courts Memorandum Decision shall preclude defendants/counter-claimants from executing on the personal property assets of the plaintiffs including real estate held outside of the Violet P. Cavanaugh Trust.

Approved:



Richard K. Nebeker
Attorney for Defendant Counter-Claimant

March 15th 88
Dated



Colin R. Winchester
Attorney for Plaintiffs

March 15, 1988
Dated

Dated this 16 day of March, 1988.

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 16 DAY OF MARCH 19 88

H DIXON HINDLEY, CLERK

BY [Signature] DEPUTY
CDN3498N

By John A. Rokich
John A. Rokich
THIRD DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY

BY [Signature]

Dennis E. McGoldrick #97720
McGoldrick & McGoldrick
18726 Western Avenue, Suite 208
Gardena, California 90248-3829
(213) 327-7212

Attorneys for Trustee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)	Bky. No. LA88-12763-CA
)	
JOHN ARTHUR CAVANAUGH	)	Chapter 7
VIOLET PHYLLIS CAVANAUGH)	
	)	STIPULATION TO ALLOW
	)	TRUSTEE TO SELL REAL
	)	PROPERTY FREE AND CLEAR OF
	)	LIENS AND INTERESTS [11 U.S.C.
	)	§ 363(f)]; ORDER THEREON
)	
	)	Date: (NO HEARING NECESSARY)
	)	Time:
Debtors.	)	Courtroom: "8529", 8th Floor

Dennis E. McGoldrick, trustee, Gordon D. Walker and Covecrest Properties, a Utah Limited Partnership, enter into the following stipulation based upon the following facts:

1. Dennis E. McGoldrick is the duly appointed and acting trustee of the estate in this Chapter 7 proceeding.

2. The Bankruptcy Estate includes property commonly described as 130 and 136 East Avenue 42, Los Angeles, California and more particularly described as:

LOTS 7 AND 8 IN BLOCK 5 OF G. W. MORGAN'S SYCAMORE GROVE TRACT, IN THE CITY OF LOS ANGELES, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 11 PAGES 57 AND 58 OF MISCELLANEOUS RECORD, IN

1 THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

2 (hereafter "the property")

3 3. The trustee desires to sell the property free and clear
4 of all interests.

5 4. The trustee filed an application to sell said property
6 free and clear of all interests, but counsel for the trustee
7 neglected to give notice of said application to Gordon D. Walker
8 and Covecrest Properties (hereafter "Walker and Covecrest"). Said
9 application was approved and an order was entered allowing the
10 sale of the property free and clear of all liens on November 2,
11 1988. The trustee now desires to clear the problem created by
12 lack of notice ot Walker and Covecrest.

13 5. Walker and Covecrest, creditors of this estate, wish to
14 see the assets of this estate liquidated so that creditors of this
15 estate may be paid.

16 6. Walker and Covecrest have different types of claims of
17 lien on the property, including a notice of pendency of action
18 recorded as instrument 87-825004 on May 26, 1987, a notice of
19 pendency of action recorded as instrument 87-1448447 on September
20 9, 1987, and an abstract of judgment recorded as 88-80842 on
21 January 20, 1988. The title report attached as Exhibit "A", and
22 incorporated herein by this reference, lists these items a items
23 7, 16 and 17.

24 7. When the abstract of judgment was filed, title to the
25 property was not in the Cavanaugh's name. Title to the property
26 was in the Violet Cavanaugh Trust until the trust was revoked by
27 Dennis E. McGoldrick in his capacity as bankruptcy trustee.

28 ///

1 NOW THEREFORE, the parties stipulate:

2 1. The trustee, Dennis E. McGoldrick, may sell the property
3 free and clear of all of the Walker and Covecrest liens (including
4 items 7, 16 and 17 on said title report).

5 2. The liens, to the extent they now encumber the property,
6 shall encumber the proceeds of the sale of said property.

7 SO STIPULATED:

8 Dated: January 12, 1989

- S -

Dennis E. McGoldrick, Trustee

10 Dated: January __, 1989

- S -

Gordon D. Walker

Covecrest Properties, a Utah
Limited Partnership

14 Dated: January __, 1989

- S -
By: _____

General Partner

Callister, Duncan & Nebeker
Attorneys for Walker and Covecrest

- S -
By: _____
Richard K. Nebeker

ORDER

22 IT IS SO ORDERED.

24 Dated: January __, 1989

BY THE COURT

- S -

CALVIN K. ASHLAND
U.S. Bankruptcy Judge

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA

240 ARTESIA BLVD., TORRANCE, CALIFORNIA 90504 TEL. (213) 542-0511

OCTOBER 25, 1988

BAY SHORE ESCROW
1026 MANHATTAN BEACH BLVD.
MANHATTAN BEACH, CALIFORNIA 90266

ATTENTION: TREVA

IR REFERENCE: 14281
: NO. : 8544257

IN RESPONSE TO THE ABOVE REFERENCED APPLICATION FOR A POLICY OF TITLE INSURANCE, TICOR TITLE INSURANCE COMPANY OF CALIFORNIA HEREBY REPORTS THAT IT IS PREPARED TO ISSUE, OR CAUSE TO BE ISSUED, AS OF THE DATE HEREOF, A POLICY OR POLICIES OF TITLE INSURANCE DESCRIBING THE LAND AND THE ESTATE OR INTEREST THEREIN HEREINAFTER SET FORTH, INSURING AGAINST LOSS WHICH MAY BE SUSTAINED BY REASON OF ANY DEFECT, LIEN OR ENCUMBRANCE NOT SHOWN OR REFERRED TO AS AN EXCEPTION BELOW OR NOT EXCLUDED FROM COVERAGE PURSUANT TO THE PRINTED SCHEDULES, CONDITIONS AND ENDORSEMENTS OF SAID POLICY FORMS.

THE PRINTED EXCEPTIONS AND EXCLUSIONS FROM THE COVERAGE OF SAID POLICY OR POLICIES ARE SET FORTH ON THE ATTACHED COVER. COPIES OF THE POLICY FORMS SHOULD BE READ. THEY ARE AVAILABLE FROM THE OFFICE WHICH ISSUED THIS REPORT.

THIS REPORT (AND ANY SUPPLEMENTS OR AMENDMENTS THERETO) IS ISSUED SOLELY FOR THE PURPOSE OF FACILITATING THE ISSUANCE OF A POLICY OF TITLE INSURANCE AND NO LIABILITY IS ASSUMED HEREBY. IF IT IS DESIRED THAT LIABILITY BE ASSUMED PRIOR TO THE ISSUANCE OF A POLICY OF TITLE INSURANCE, A BINDER OR COMMITMENT SHOULD BE REQUESTED.

DATED AT 7:30 A.M. AS OF OCTOBER 17, 1988

TITLE OFFICER: D.MC CRADY

THE FORM OF POLICY OF TITLE INSURANCE CONTEMPLATED BY THIS REPORT IS:
ALTA LOAN POLICY - 1970 WITH ALTA ENDORSEMENT FORM 1 COVERAGE
(AMENDED 10-17-70)

TITLE TO THE ESTATE OR INTEREST REFERRED TO HEREIN, AT THE DATE HEREOF, IS VESTED IN:

JOHN A. CAVANAUGH AND VIOLET P. CAVANAUGH, HUSBAND AND WIFE, AS JOINT TENANTS

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA

THE ESTATE OR INTEREST IN THE LAND HEREINAFTER DESCRIBED OR REFERRED TO COVERED BY THIS REPORT IS: A FEE.

AT THE DATE HEREOF EXCEPTIONS TO COVERAGE IN ADDITION TO THE PRINTED EXCEPTIONS AND EXCLUSIONS CONTAINED IN SAID POLICY FORM WOULD BE AS FOLLOWS:

GENERAL AND SPECIAL COUNTY AND CITY TAXES

FOR THE FISCAL YEAR 1988-1989, INCLUDING PERSONAL PROPERTY TAX, IF ANY,
TOTAL AMOUNT : \$1,806.24
FIRST INSTALLMENT : \$905.79
SECOND INSTALLMENT : \$900.45
CODE AREA : 4
PARCEL NO. : 5467-2-7
ASSESSED VALUATIONS FOR THE YEAR 1988-1989
AND : \$21,296.00
IMPROVEMENTS : \$136,675.00
EXEMPTIONS : NONE
NET : \$158,491.00

THE LIEN OF SUPPLEMENTAL TAXES, IF ANY, ASSESSED PURSUANT TO THE PROVISIONS OF CHAPTER 3.5 (COMMENCING WITH SECTION 75) OF THE REVENUE AND TAXATION CODE OF THE STATE OF CALIFORNIA.

AN EASEMENT AFFECTING THE PORTION OF SAID LAND AND FOR THE PURPOSES STATED HEREIN, AND INCIDENTAL PURPOSES,
IN FAVOR OF : CITY OF LOS ANGELES
NO REPRESENTATION IS MADE AS TO THE PRESENT OWNERSHIP OF SAID EASEMENT)
FOR : CONDUCTING WATER
RECORDED : IN BOOK 61 PAGE 208 OF DEEDS
EFFECTS : LOT 7

A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT STATED HEREIN

DATED : MARCH 7, 1977
AMOUNT : \$136,500.00
LENDER : BRUCE A. BRAUN, BRIAN GURNEE, ROBERT ACHESON AND JOHN FITZPATRICK, EACH MARRIED MEN, AS THEIR SOLE AND SEPARATE PROPERTY, AS TO AN UNDIVIDED 25 PER CENT INTEREST
TRUSTEE : SUPERIOR TITLE SERVICE, INC., A CALIFORNIA CORPORATION
BENEFICIARY : UNION FEDERAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION
RECORDED : MARCH 28, 1977
INSTRUMENT NO.: 77-306194

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA

AN ASSIGNMENT OF RENTS, AS ADDITIONAL SECURITY FOR THE PAYMENT OF
INDEBTEDNESS SECURED BY THE DEED OF TRUST INSURED HEREIN, WHICH
ASSIGNMENT WAS

ASSIGNED BY : BRUCE A. BRAUN, BRIAN GURNEE, ROBERT ACHESON AND JOHN
FITZPATRICK EACH MARRIED MEN, AS THEIR SOLE AND SEPARATE
PROPERTY, AS TO AN UNDIVIDED 25 PER CENT
TO : UNION FEDERAL SAVINGS AND LOAN ASSOCIATION
DATED : MARCH 28, 1977 AS INSTRUMENT NO. 77-306195
INCLUDES : RENTAL

A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
STATED HEREIN

DATE : MAY 6, 1982
AMOUNT : \$241,000.00
BORROWER : JOHN CAVANAUGH AND VIOLET CAVANAUGH, HUSBAND AND WIFE
TRUSTEE : SAFECO TITLE INSURANCE COMPANY, A CALIFORNIA CORPORATION
BENEFICIARY : TACOMA SAVINGS AND LOAN ASSOCIATION, AN ASSOCIATION
DATED : JUNE 29, 1982
INSTRUMENT NO. : 82-650956

INSTRUMENT SUBSTITUTES THE TRUSTEE IN SAID DEED OF TRUST

NEW TRUSTEE : T. D. SERVICE COMPANY
DATED : SEPTEMBER 28, 1984
RECORDED : OCTOBER 2, 1984 AS INSTRUMENT NO. 84-1187525

NOTICE OF DEFAULT UNDER THE TERMS OF SAID DEED OF TRUST BY THE
LEGISLATED OWNER AND HOLDER OF THE NOTE SECURED THEREBY

RECORDED : OCTOBER 2, 1984 AS INSTRUMENT NO. 84-1187526
EXECUTED BY : AMERICAN SAVINGS BANK

AN ACTION IN THE MUNICIPAL COURT

JUDICIAL DISTRICT: LOS ANGELES
COMMENCED : MAY 21, 1987
TITLED : GORDON D. WALKER AND COVECREST PROPERTIES VS. JOHN A.
CAVANAUGH, VIOLET P. CAVANAUGH AND SNOWCAP PROPERTIES
CASE NO. : 87K21089, COUNTY OF LOS ANGELES
NATURE OF ACTION : TO SET ASIDE THE TRANSFER OF THE REAL PROPERTY INTO THE
VIOLET P. CAVANAUGH TRUST ON THE BASIS THAT SAID TRANSFER
WAS DONE TO AVOID POTENTIAL CREDITORS.
AFFECTS : SAID LAND

NOTICE OF THE PENDENCY OF SAID ACTION WAS

RECORDED: MAY 26, 1987 AS INSTRUMENT NO. 87-825004

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA

A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATED : OCTOBER 5, 1981
AMOUNT : \$80,000.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH TRUSTEE
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDNA ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934483

A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATED : APRIL 25, 1983
AMOUNT : \$30,000.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDNA ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934484

A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATED : JUNE 30, 1983
AMOUNT : \$15,000.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH, TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDWARD ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934485

A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATED : NOVEMBER 14, 1984
AMOUNT : \$36,995.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDNA ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934486

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA

4. A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATE : APRIL 23, 1985
AMOUNT : \$14,095.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH, TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDWARD ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934487

5. A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATE : MAY 6, 1983
AMOUNT : \$20,000.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH, TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDWARD ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934488

6. A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATE : FEBRUARY 28, 1986
AMOUNT : \$10,800.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH, TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDWARD ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934489

7. A DEED OF TRUST TO SECURE AN INDEBTEDNESS IN THE ORIGINAL AMOUNT
DATED HEREIN

DATE : MAY 15, 1984
AMOUNT : \$15,000.00
TRUSTOR : VIOLET P. CAVANAUGH TRUST, VIOLET P. CAVANAUGH, TRUSTEE DATED
MARCH 20, 1986
TRUSTEE : FIRST AMERICAN TITLE
BENEFICIARY : EDWARD ZIMMER
RECORDED : JUNE 12, 1987
INSTRUMENT NO.: 87-934490

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA:

6. AN ACTION IN THE MUNICIPAL COURT
JUDICIAL DISTRICT: LOS ANGELES
COMMENCED : AUGUST 6, 1987
ENTITLED : COVECREST PROPERTIES AND GORDON D. WALKER VS. JOHN A.
CAVANAUGH AND VIOLET P. CAVANAUGH
CASE NO. : 0660705, COUNTY OF LOS ANGELES
NATURE OF ACTION : NOW CONSTITUTES A GOOD AND SUFFICIENT JUDGMENT LIEN ON THE
REAL PROPERTY
EFFECTS : SAID LAND

NOTICE OF THE PENDENCY OF SAID ACTION WAS
RECORDED: SEPTEMBER 9, 1987 AS INSTRUMENT NO. 87-1448447

7. AN ABSTRACT OF JUDGMENT FOR THE AMOUNT HEREIN STATED AND ANY
OTHER AMOUNTS DUE
CASE NO. : C 660 705, LOS ANGELES COUNTY SUPERIOR COURT
DEBTOR : JOHN A. CAVANAUGH AND VIOLET P. CAVANAUGH
CREDITOR : GORDON D. WALKER, COVECREST PROPERTIES
AMOUNT : \$787,441.11
ENTERED : NOVEMBER 2, 1987
RECORDED : JANUARY 20, 1988 AS INSTRUMENT NO. 88-80842

8. OTHER MATTERS OF RECORD WHICH DO NOT DESCRIBE SAID LAND, BUT
WHICH, IF ANY EXIST, MAY AFFECT THE TITLE. THE NECESSARY SEARCH AND
EXAMINATION WILL BE COMPLETED WHEN A STATEMENT OF INFORMATION HAS
BEEN RECEIVED FROM RECORD OWNER OR OWNERS
A POLICY WILL BE ISSUED UNDER THIS ORDER UNTIL WE ARE FURNISHED WITH
ADDITIONAL STATEMENTS OF INFORMATION. PLEASE FORWARD AS SOON AS POSSIBLE TO
ASSIST IN THE EARLY CLEARANCE OF MATTERS OF RECORD AGAINST PERSONS WITH
THE SAME OR SIMILAR NAMES.

DESCRIPTION:

LOTS 7 AND 8 IN BLOCK 5 OF G. W. MORGAN'S SYCAMORE GROVE TRACT, IN THE CITY OF
LOS ANGELES, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP
RECORDED IN BOOK 11 PAGES 57 AND 58 OF MISCELLANEOUS RECORDS, IN THE OFFICE OF
THE COUNTY RECORDER OF SAID COUNTY.

THE TITLE OF THE VESTEE HEREIN WAS ACQUIRED BY DEED RECORDED:
LESS THAN SIX MONTHS FROM THE DATE HEREOF

INSURANCE RATE: 100 PER CENT

1983, DUP., PLATS

TICOR TITLE INSURANCE COMPANY OF CALIFORNIA

240 ARTESIA BLVD., TORRANCE, CALIFORNIA 90504 TEL. (213) 542-0511

*
*
*

ENTION:

R NO.:

NO. : 8544257

LE OFFICER: D. MC CRADY

ABOVE NUMBERED REPORT (INCLUDING ANY SUPPLEMENTS OR AMENDMENTS
RETO) IS HEREBY MODIFIED AND/OR SUPPLEMENTED TO REFLECT THE
LOWING ADDITIONAL ITEMS RELATING TO THE ISSUANCE OF AN AMERICAN
D TITLE ASSOCIATION LOAN FORM POLICY AS FOLLOWS:

A.L.T.A. INSPECTION DISCLOSES THE MATTERS LISTED BELOW:

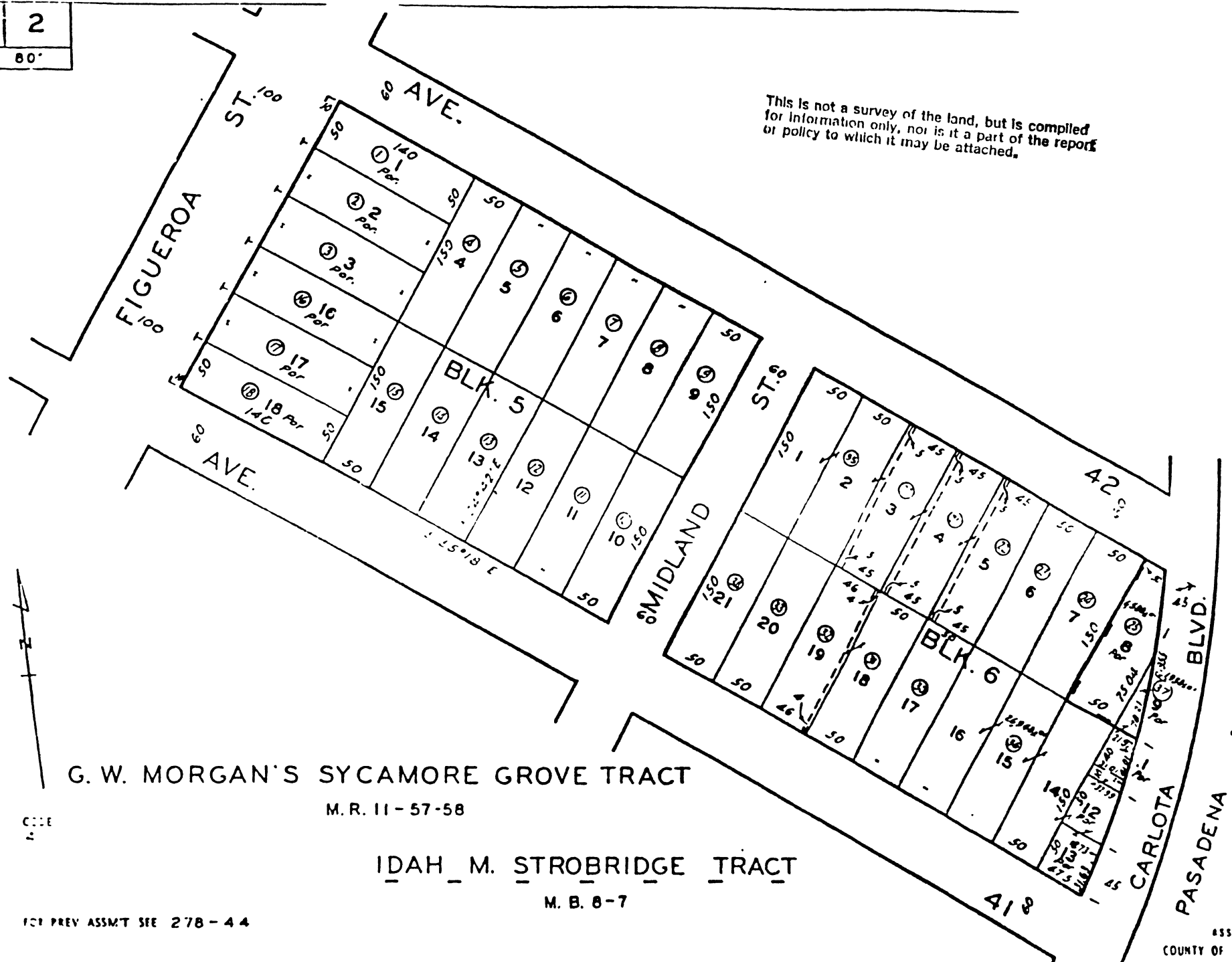
AN INVESTIGATION DISCLOSES IMPROVEMENTS ON SAID LAND,
DESIGNATED AS:

TYPE OF IMPROVEMENT: A SINGLE RESIDENCE

STREET ADDRESS : 130 EAST AVENUE 42, LOS ANGELES, CALIFORNIA

OUR A.L.T.A. LOAN POLICY, WHEN ISSUED, WILL CONTAIN C.L.T.A.
DORSEMENT NO. 100.

This is not a survey of the land, but is compiled for information only, nor is it a part of the report or policy to which it may be attached.



CODE

FOR PREV ASSMT SEE 278-44

NOTES TO DECISIONS

ANALYSIS

Allegation of insolvency.
Determination of insolvency.

Allegation of insolvency.

Allegation of insolvency in a complaint in an action to set aside a conveyance was sufficient as against contention that it was a conclusion. *Zuniga v. Evans*, 87 Utah 198, 48 P.2d 513, 101 A.L.R. 532 (1935).

Determination of insolvency.

The determination of insolvency under this section is not the same as the determination of

insolvency in the bankruptcy sense, as this section requires merely a showing that the party's assets are not sufficient to meet liabilities as they become due. *Meyer v. General Am. Corp.*, 569 P.2d 1094 (Utah 1977).

In an action by a creditor to set aside an allegedly fraudulent conveyance of real estate by a debtor, the plaintiff did not demonstrate that the debtor was insolvent where the only evidence was that the debtor submitted two checks that were returned unpaid. *Furniture Mfrs. Sales, Inc. v. Deamer*, 680 P.2d 398 (Utah 1984).

COLLATERAL REFERENCES

A.L.R. — Imputation of insolvency as defamatory, 49 A.L.R.3d 163.

Key Numbers. — Fraudulent Conveyances
↔ 57(1).

25-6-4. Value — Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection 25-6-5(1)(b) and Section 25-6-6, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

History: C. 1953, 25A-1-4, enacted by L. 1988, ch. 59, § 4; recompiled as C. 1953, 25-6-4.

Effective Dates. — Laws 1988, Chapter 59 became effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

25-6-5. Fraudulent transfer — Claim arising before or after transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

History: C. 1953, 25A-1-5, enacted by L. 1988, ch. 59, § 5; recompiled as C. 1953, 25-6-5.

Effective Dates. — Laws 1988, Chapter 59

became effective on April 25, 1988, pursuant to Utah Const., Art. VI, Sec. 25.

Cross-References. — Defrauding creditors as a misdemeanor, § 76-6-511.

NOTES TO DECISIONS

ANALYSIS

Assignments.

Badges of fraud.

Construction and application.

Constructive trust.

Conveyances between relatives.

Evidence.

Fair consideration.

"Good faith" transfer.

Mortgagor remaining in possession.

Parent and child.

Assignments.

Rule that sale or assignment of chattels, unaccompanied by change of possession, is fraudulent per se as to execution creditors of, or subsequent purchasers from, seller or assignor does not necessarily apply to assignments for benefit of creditors, but long delay in taking possession is circumstance from which fraud may be prima facie inferred. *Snyder v. Murdock*, 20 Utah 419, 59 P 91 (1899).

Whether an assignment of an interest in an estate was in good faith and not to hinder, delay or defraud creditors, or was made for such purpose, depends upon the facts and circumstances surrounding the transaction, as gathered from the badges of fraud present. *Boccalero v. Bee*, 102 Utah 12, 126 P.2d 1063 (1942).

Badges of fraud.

Although actual fraudulent intent must be shown to hold a conveyance fraudulent, its existence may be inferred from the presence of certain indicia of fraud or "badges of fraud." *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420 (Utah 1986).

"Badges of fraud," from which actual intent may be inferred, include, inter alia, a debtor's (1) continuing in possession and evidencing the prerequisites of property ownership after having formally conveyed all his interest in the property, (2) making a conveyance in anticipa-